

COMMONWEALTH OF MASSACHUSETTS
EXECUTIVE OFFICE OF COMMUNITIES AND DEVELOPMENT
DEPARTMENT OF COMMUNITY AFFAIRS
HOUSING APPEALS COMMITTEE

HARBOR GLEN ASSOCIATES

V.

BOARD OF APPEALS OF THE TOWN OF HINGHAM

No. 80-06

DECISION

August 20, 1982

Housing Appeals Committee

Maurice Corman, Chairman

John Carney, Counsel

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APPELLANT

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APPELLEE

DECISION

I. STATEMENT OF PRIOR PROCEEDINGS

This is an appeal from the decision of the Board of Appeals of the Town of Hingham¹ denying an application for a Comprehensive Permit to build low or moderate income housing.

The Appellant, Harbor Glen Associates², a limited dividend developer, on February 25, 1980 submitted

¹Hereinafter variously referred to as the "Board", the "Appellee" or the "Respondent".

²Hereinafter variously referred to as the "Developer", the "Appellant", the "Petitioner", or the "Applicant".

this application to the Board for a Comprehensive Permit to construct 288 units of housing on a 36.2 acre site, a portion of the former Hingham Ammunition Depot, in Hingham. The application was filed under the provisions of Chapter 774 of the Acts of 1969³.

The Board gave due notice, as required by the Statute, conducted a public, administrative hearing and, by decision dated June 2, 1980, denied the application.

From that denial, the applicant filed this appeal to the Housing Appeals Committee⁴. The Committee convened a conference of counsel, conducted a site view, and on October 16, 23, November 18, December 9, 1980, and January 22, 1981, conducted a public hearing at the Hingham Town Hall. This hearing, as required by the Statute, was conducted as an adjudicatory hearing. Witnesses were sworn, full right of cross-examination was afforded the parties, and a stenographic record of the proceedings was kept.

³St. 1969, c. 774; now G.L. c. 40B, ss 20-23, hereinafter referred to as the "Statute", or "Chapter 774". References to a section, as "Section 20", refer to that section of G.L. c. 40B.

⁴Hereinafter referred to as "HAC", or the "Committee".

II. ISSUES

As provided in Section 23 of the Statute, the sole issue before the Committee is whether or not the denial by the Board was "consistent with local needs". What constitutes "consistent with local needs" is defined in Section 20 of the Statute, and in greater detail in the Hanover case⁵. If the denial by the Board is consistent with local needs, the Committee has no jurisdiction to reverse it.

In brief, the decision by the Board is deemed "consistent with local needs" if the Town has already met certain minimum criteria with respect to the number of low or moderate subsidized housing units already existing, the area occupied by such units, or the area to be occupied by such units which are slated for construction in the upcoming year.

The Town does not argue that it has met any of these criteria.

The Board's decision may still be deemed consistent with local needs if it can be shown that

⁵Board of Appeals of Hanover v. Housing Appeals Committee, 363 Mass. 339 (1973). The leading case. Hereinafter referred to as the Hanover case, or "Hanover".

the proposed development involves health or safety hazards, or valid planning objections, of gravity sufficient to outweigh the regional need for this housing, together with the number of low-income persons in Hingham.

It is on this broad ground, generally, that the Board argues that its denial of the Comprehensive Permit is "consistent with local needs", and that therefore it cannot be reversed by the Committee.

We find, on the record, that the Appellant is a limited dividend developer as required by the Statute, that it has the requisite property interest in the site, and that it has met the preliminary requirements for subsidy financing with the Massachusetts Housing Financing Agency to qualify it to maintain this action. We find further, on the record, that the issues of regional housing need, and the number of low-income persons in Hingham, have been sufficiently proved to satisfy the requirements of the Statute. We find further that while 36.2 acres exceeds the statutory limit for this type of construction in a single year, this objection could be resolved by a condition attached to the Comprehensive Permit which

the Appellee is amenable, and for which there is precedent in previous decisions of the Committee, affirmed by the Supreme Judicial Court⁶.

A. Health and Safety Factors

As indicated, where the Town has not met any of the mathematical criteria relating to consistency with local needs, it may still show that its denial is consistent with local needs in that health, safety or valid planning objections exist that outweigh the regional housing need.

The language of the Statute (Section 20) and the discussion in "Hanover" (supra, fn. 5) in effect divide these factors into two groupings usually referred to as "health and safety factors" and "valid planning objections".

The only issues raised in the area of potential health and safety hazards were (1) the capacity of the existing private sewer system to handle the sewage from the 288 apartments, and (2) the legal right of the Appellant to maintain the license agreement with the Town for the private sewer main to cross public property.

⁶Board of Appeals of Maynard vs. Housing Appeals Committee (1976) 345 NE 2nd 382, 385.

We find, on the record, that the existing private sewer line, the Hingham sewer system, and the MDC pumping are adequate to handle the burden from this development, and indeed other pending developments on the drawing board, or can be made so at very little expense⁷. We agree also with the Appellant that the possibility that the privilege to cross public property with a private sewer line might be revoked by the Town is too remote to contemplate. Such an action by the Town would be a classic example of a restrictive requirement which could be set aside on application to the Committee⁸.

B. Planning Objections

We find, on the record, that the site plan and building layout and design have been excellently conceived and executed, with sensitive concern for the critical aspects of the site, its relationship to the Weymouth Back River, the eight to nine acre tidal marsh in the central portion, and the dominant esker in the southern portion of the site. Parking is adequate, and drainage has been designed so that it

⁷See Transcripts: Nov. 18 at pp. 97-99; Jan. 20 at pp. 8, 13, 22; Exhib. 6, App. 2.

⁸"Maynard" (see fn. 6 supra) at pp. 385-386.

does not run off into the tidal marsh - a matter of concern to the Hingham Conservation Commission. The excellence of the overall design reflects the particular familiarity with this area of the architect, Samuel Nuckols, and the firm, Sasaki Associates. This firm had prepared the master site plan for the adjacent Beals Cove Village apartment complex⁹.

The major point of difference between the parties is the extent to which the use planned for this site by the Developer conflicts with its planned use as an Office Park, as envisioned in the Town's Depot Study and consequent zoning amendments. Because that is the critical issue, and because our decision in this case turns on that issue, we discuss that planning factor in greater detail under a separate heading.

1. The Depot Study and 1971 Zoning Amendments

The Board's decision emphasizes that the zoning developed for the area of which this site is a part did not follow the procedure which generally is characteristic of establishment of most zoning districts. Generally such areas are already substantially developed; there is little or no

⁹Transcript (Oct. 16) pp. 12-17; Exhibits 5, 17.

opportunity to apply desirable concepts of land use planning; and the typical zoning boundaries simply reflect the previous growth patterns.

With respect to the 750 acres which formerly comprised the Hingham Naval Ammunition Depot, and where our site is located, this usual situation did not apply. When the Navy declared this property to be surplus, an unusual opportunity for a well-planned development of the area was presented to the Town. Fresh in the minds of the townspeople was the experience of the unplanned, unrestrained and uncontrolled development which had occurred in the former Hingham Shipyard area north of Route 3A.

The efforts of the Selectmen to respond to this opportunity are documented throughout the record. A special committee, the Ammunition Depot Study Committee, was appointed; six individuals with experience in real estate, property management, conservation and planning. The Committee retained Charles E. Downe, a highly reputable professional planner. The planning process studied the physical characteristics of the tract, uses in adjacent areas, road, rail and waterway systems, wetland and wildlife

concerns, and suitability of septic tank disposal systems. Information gathering and analysis included consultation with various groups, both within and outside the town, public meetings and extensive discussions. Concern for community needs was reflected in the areas of open space, park land, space for educational facilities and need for an office park.

The need for multi-family housing was addressed, and in particular, housing under Chapter 774¹⁰.

The planning process resulted in the evolutionary development of a series of five "concept" plans. The recommendations were embodied in the present zoning of the 750 acres which was approved at the 1971 Town Meeting¹¹.

The entire 750 acre tract was rezoned from industrial to a variety of uses. Four hundred sixty acres were set aside for park land. The remaining 300 acres were devoted to single-family residential, multi-family residential, school, open space and office

¹⁰Transcript (Oct. 23) pp. 35-39; Exhib. 21, p. 5; Exhib. 21A.

¹¹Transcript (Oct. 23) pp. 20-25, 28, 31. (Nov. 18) p. 75, (Dec. 9) pp 4-5; Exhibits 18, 19, 20, 21.

park. Small parcels were set aside for a drug rehabilitation center and a conservatory of music.

Eighty-five acres were allocated to multi-family housing. Of this amount, 58 acres have been built upon or approved for multi-family housing, including 27 acres on which the Town has already granted a Chapter 774 Comprehensive Permit for 196 units of subsidized housing, leaving 27 acres for further subsidized housing (Exhibit 7).

The zoning which embodies the Committee's planning recommendations placed an office park in the northwest corner of the 750 acre tract in the roughly triangular area formed by Weymouth Back River, Route 3A and Beal Street. This area comprises 44 acres. The site on which Harbor Glen proposes to erect these 288 units covers 36.2 of the 44 acres.

The Board argues that the office park was placed in this area because of considerations which made it the best location for an office park in the 750 acre tract, particularly because of the proximity of the shipyard area north of Route 3A, and the mushrooming of industries there. The Board argues further that leaving only eight acres would not be enough for an

office park, that its careful planning would be frustrated, and that among other things the Town would be hurt in the deprivation of the enhanced tax revenues that had been anticipated from the designated land use. The Board points out in its decision that any change in the overall plan will inevitably have an impact on the balance of the plan.

In particular the Board argues that it was not the intention of the Legislature in enacting the Chapter 774 program to grant Comprehensive Permits in all cases where a town had not met its 774 "quota", particularly in a case like the present one where the Town had no past history of opposition to low or moderate income housing, and where the granting of such a permit would subvert careful planning efforts in which Chapter 774 needs had been specifically addressed.

The Developer points out, on the other hand, that an "Office Park" zone is not needed to the extent that the housing is needed, that business and professional offices are a permitted use not only in an "Office Park District" but also in Business A Districts, Business B Districts, Waterfront Business Districts,

Industrial A Districts, Industrial B Districts and in Industrial Parks, all of which districts actually exist elsewhere on the Hingham Zoning Map - Part A.

The Town has argued that a major planning consideration in designating this area as an Office Park was its "buffering" effect between adjacent residential areas and the heavier industrial development in the shipyard. The Developer counters by pointing out that sufficient "buffer" areas already exist in Beal Cove Park, the remaining eight acres of the Office Park and the football field, and that the use of the site for residential purposes is fully compatible with existing adjacent uses.

This case squarely presents the Housing Appeals Committee the issue of the weight to be given to a Master Plan which is in contravention of the land use sought by an applicant for a Comprehensive Permit. The handling of this issue by the Committee in previous cases indicates that there is no categorical answer. The Committee looks to legislative intent, both in Chapter 774 and in the zoning laws. In the process of weighing the housing need against valid planning objections, certainly a Master Plan is a valid planning

factor which must be so weighed; but in our interpretation and administration of Chapter 774, it is no more than that. Where the Master Plan is totally unrealistic with respect to present land uses or reasonably potential future uses, where there is more than a suspicion that the Master Plan is simply a sophisticated maneuver to perpetuate precisely the abuses which Chapter 774 was designed to eliminate, where the Master Plan is simply an ancient planning exercise, ignored and gathering dust for years, and now dusted off to frustrate housing for which there is a clearly demonstrated need, the Master Plan will not prevail in the weighing process.

We do not, however, find on the record, that any of these objections, or any similar objections, can be raised against the Ammunition Depot Plan that gave rise to the current zoning of this area. The carefully selected committee, the impeccable credentials of the selected planner, Charles E. Downe, the prolonged process of public discussion of all issues and public needs, reduce almost totally the likelihood of any second guessing by the Housing Appeals Committee. As indicated in the Board's decision, this was not the

usual zoning situation of freezing in place an existing status quo, or of subtly using the zoning laws to exert negative pressure against the building of low or moderate-income housing. It was a unique planning opportunity in that the sudden availability of a 750 acre undeveloped tract in a built up neighborhood presented a "tabula rasa" for bold and imaginative urban design. In particular, we are impressed by the fact that where 460 acres of this tract were set aside for park land, of the remaining 300 acres, 85 acres, more than 25 per cent, was set aside for multi-family housing, which includes Chapter 774 housing. This was in the early 1970's. Chapter 774 was passed in 1969. The attitude of most towns toward the "774" program at that time was bitterly hostile. There were not too many examples of towns zoning at that time to facilitate provision of low or moderate income housing.

With 27 acres of that land still available for this housing under the existing zoning, it is difficult for this Committee, in the weighing process, to justify a change in the Master Plan which in effect would wipe out the provisions in that plan for an Office Park.

Several additional arguments raised by the developer should be addressed. The developer has argued that because a hotel or motel could be erected by special permit in the Office Park, in effect, this zoning regulation has not been applied as equally as possible to both subsidized and unsubsidized housing under Chapter 774. We do not construe a hotel or motel to be "unsubsidized housing" in the sense contemplated by the Statute. It is a commercial enterprise primarily, not "unsubsidized housing" in any permanent or practical sense, and the implication in the local zoning that it may well be a compatible use in an "Office Park" district is not one we would quarrel with.

A weightier argument raised by the developer has its genesis in the "Marketability Report" of Meredith and Grew prepared in 1971 (Exhibit 21, Appendix B). That report indicated that demand for office or industrial space in this area would be of a local nature, not New England-wide, and that the development thrust in this area should be directed toward housing of all types. The developer points out that in the intervening decade, no office space has been developed

in this Office Park District while much office space has been built in other industrially zoned land in Hingham nearby by Route 3.

It may well be, in retrospect, that the Office Park District is not going to attract office space development, for whatever reason, and that it should be rezoned. If that turns out to be so, procedures exist for bringing that about in a reasoned and orderly fashion, and this Town has certainly demonstrated its willingness and competence to utilize that process. An application through Chapter 774 is not the way. While this Committee has not, in numerous other cases, shrunk from in effect bringing about such a result in carrying out the mandate of the Legislature in Chapter 774, this is not such a case.

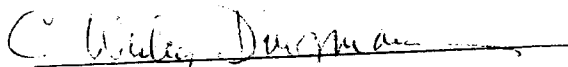
Our decision in this case makes it unnecessary to rule on the motion, filed by the Developer after the formal hearing and contested by the Board, in which the Developer sought to change the original proposal from all rental units to a combination of condominiums and subsidized rental units.

III. RULING

On the basis of our subsidiary findings and rulings, and on the whole record, we rule that the denial of the Comprehensive Permit was consistent with local needs. The decision of the Board of Appeals of the Town of Hingham is upheld.

HOUSING APPEALS COMMITTEE


Maurice Corman, Chairman



Date:  August 20, 1982